NO. 47224-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

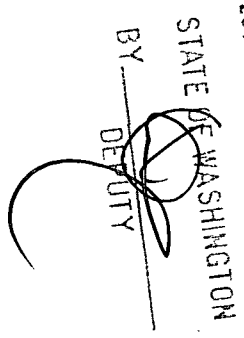
SHASTA APARTMENT, LLC, CHARLES R. JOHNSON, II and ELIZABETH A. JOHNSON,

Appellants,

v.

UMPQUA BANK,

Respondent.



BRIEF OF RESPONDENT UMPQUA BANK

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
The Honorable Thomas P. Larkin

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ORIGINAL

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I. INTRODUCTION

In this case Appellants challenge the Receiver's sale of real property after the property was listed for sale by a court-approved real estate broker, sold to a third party, the sale approved by the court, and the sale proceeds applied to reduce the loan balance owed by Appellants to Umpqua. In the absence of any authority, Appellants Shasta Apartments, LLC ("Shasta"), and Charles R. Johnson, II, Elizabeth A. Johnson, and their marital community (collectively, the "Johnsons"), urge this Court to ignore statutes and case law governing commercial loan defaults for more than one-half century, and reverse the Orders granting Respondent Umpqua ("Umpqua") summary judgment of a post-sale deficiency award against them, and denying them summary judgment of dismissal.

Appellants ask this Court hold that under Washington's Receivership Act, such a court-ordered sale of real property by a court-appointed Receiver without redemption rights, notwithstanding there is no Trustee involved and no foreclosure sale, constitutes a nonjudicial foreclosure, such that a deficiency award is barred by the Deed of Trust Act. In so arguing, Shasta and the Johnsons interchange the concepts of a third-party sale by the Receiver with a foreclosure as if they were identical, blurring the distinctions between the Receivership Act and the

Deed of Trust Act, and ignoring the parties' contracts and controlling precedent.

Long-standing black letter law holds that a court's power to order a Receiver's sale is independent of its power granted by foreclosure statutes. Further, a deficiency is nothing more than the remaining amount owed after the sale proceeds are applied to the loan balance, *i.e.,* the "deficit," and not specific to either a judicial or nonjudicial foreclosure. Accordingly, the Court's ability to award a deficiency Judgment exists independently of foreclosure statutes.

But even if the trial court's Orders are analyzed under the foreclosure statutes, a Court-ordered sale of real property by a court-appointed Receiver constitutes a judicial sale – not a foreclosure. *Walton v. Severson*, 100 Wn.2d 446, 452, 670 P.2d 639 (1983). After judicial foreclosure sale proceeds are credited, the trial court is obligated to enter Judgment for any balance remaining due to the creditor. RCW 61.12.070. The Receivership Act allows for court-ordered sales without redemption rights. RCW 7.60.260(2).

But neither the Receivership Act, the foreclosure statutes, nor any other authorities provides that if the trial court orders a Receiver's sale without redemption rights, it is barred from granting an award for the remaining balance due to the creditor. It is not this Court's province to re-

write legislative enactments at Appellants' invitation. There is no reason to treat proceeds from a court-ordered Receiver's sale any differently than proceeds from a court-ordered Sheriff's foreclosure sale, and Appellants argue none.

Shasta's and the Johnsons' arguments omit any reference to the parties' contract terms. Those terms entitle Umpqua to pursue multiple remedies simultaneously for the debtor's and guarantors' defaults, and Umpqua waived no remedies by requesting a Receiver's appointment. Shasta also waived any defenses to Umpqua obtaining a full deficiency Judgment. Appellants assign no error to the trial court's failure to apply the Election of Remedies Doctrine to these facts, and offer no arguments why these contract terms between sophisticated parties should be ignored. The trial court correctly ruled in enforcing the parties' contracts.

Shasta and the Johnsons seek to overturn the $932,997.22 money Judgment against them by entangling three different statutory schemes, requesting this Court read into the Receivership Act provisions which do not exist, and ignoring the parties' contracts. Because the trial court did not err in denying Shasta and the Johnsons summary judgment, granting Umpqua summary judgment, and entering a money Judgment, Umpqua respectfully requests the Court:

1. Affirm the Order Denying Motion for Summary Judgment on Behalf of Respondents Shasta Apartments, LLC, and Charles R. Johnson, II and Elizabeth A. Johnson, Husband and Wife, entered December 12, 2014;

2. Affirm the Order Granting Petitioner's [Umpqua's] Motion for Summary Judgment Against Shasta Apartments, LLC, and for Entry of Default Judgment Against Other Respondents, entered December 12, 2014;

3. Affirm Umpqua's Judgment Against Respondents Shasta Apartment, LLC, Charles R. Johnson, II, and Elizabeth A. Johnson, entered February 6, 2015; and

4. Award Umpqua its prevailing party attorneys' fees and costs incurred for this appeal.

II. ASSIGNMENTS OF ERROR

Umpqua makes no assignments of error, as the summary judgment Orders and Judgment entered were correct. Umpqua restates the issues pertaining to Shasta's and the Johnsons' assignments of error as follows:

1. Pursuant to the Election of Remedies Doctrine and contract law, the trial court did not err by awarding summary judgment and entering a money Judgment for Umpqua and denying Appellants summary judgment dismissal, because: (1) the court-ordered Receiver's sale is not

inconsistent with granting Umpqua the remaining unpaid balance due; and (2) Shasta expressly waived all defenses to a Judgment for the full post-sale balance due, regardless of the manner of sale.

2. Pursuant to the Receivership Act, RCW 7.60, *et seq.*, and RCW 61.12.070, after ordering and confirming the court-appointed Receiver's sale of the debtors' real property, the trial court did not err by awarding summary judgment and entering a money Judgment for Umpqua and denying Appellants summary judgment dismissal, because: (1) a Receiver's sale of realty is a judicial sale, not a foreclosure; (2) Umpqua also sued for judicial foreclosure and did not waive a deficiency Judgment; (3) entry of a deficiency Judgment is mandatory after a judicial foreclosure; and (4) there is no basis to distinguish between judicial sale proceeds and foreclosure sale proceeds in entitlement to a deficiency award.

3. Pursuant to the Receivership Act, RCW 7.60, *et seq.*, the judicial foreclosure statutes, RCW 61.12, *et seq.*, and the Deed of Trust Act, RCW 61.24, *et seq.*, after ordering and confirming the court-appointed Receiver's sale of the debtors' real property without redemption rights, the trial court did not err by awarding summary judgment and entering a money Judgment for Umpqua and denying Appellants summary judgment of dismissal, because: (1) a Receiver's sale of realty is a judicial

sale, not a foreclosure; (2) Umpqua also sued for judicial foreclosure and did not waive a deficiency Judgment; (3) entry of a deficiency Judgment is mandatory after a judicial foreclosure; (4) there is no basis to distinguish between judicial sale proceeds and foreclosure sale proceeds in entitlement to a deficiency award; and (5) a Receiver's sale is not a nonjudicial foreclosure.

III. STATEMENT OF THE CASE[1]

A. Shasta Enters Mortgage Loan with Evergreen Bank, Waives Deficiency Defenses, the Johnsons Twice Unconditionally Guarantee Shasta's Performance, Umpqua Acquires Loan, and Shasta and the Johnsons Default on the Loan and Guarantees.

On June 15, 2007, Shasta made and delivered to Evergreen Bank, a promissory note in the principal amount of $581,226.45 (the "Note"). [CP 271.] To secure repayment of the Note, on the same date Shasta executed a Deed of Trust of real property, which was subsequently modified (collectively with the Note and other securing documents [CP 43-93], the "Loan"). [CP 272-74, 283-99.] The secured realty is commonly known as 1545 South Fawcett Avenue, Tacoma, Washington 98402 (the "Property"). [CP 385.]

The Deed of Trust is the paramount and first position lien encumbering the Property. [CP 272.] It provides, in part: "Grantor

[1] Umpqua generally agrees with Appellants' Statement of the Case [Appellants' Brief, pp. 4-6], but restates the case to provide correct citations to the record.

waives all rights or defenses arising by reason of any 'one action' or 'anti-deficiency' law, or any other law which may prevent Lender from bringing any action against Grantor, including a claim for deficiency ...." [CP 56.] It also states: "Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy ...." [CP 60.]

On August 6, 2009, Shasta made and delivered to Evergreen Bank a new promissory Note, with a principal balance of $1,055,271.51, and maturity date of October 18, 2010 (the "Replacement Note"). The Replacement Note replaced the existing Note, and contained a provision for Shasta's payment of all attorney's fee, costs, and expenses incurred in collecting the Replacement Note. [CP 273, 279-81.]

The Replacement Note was secured by new instruments, including a Commercial Guaranty executed by Charles R. Johnson, II, dated August 6, 2009 (the "Evergreen Guaranty"). [CP 273, 301-04.] In part, the Evergreen Guaranty provides:

> Guarantor [Mr. Johnson, his successors and assigns] *absolutely and unconditionally guarantees* full and punctual payment and satisfaction of the Indebtedness of Borrower [Shasta] to Lender [Evergreen Bank, its successors and assigns], and the performance and discharge of all Borrower's obligations under the Note and the Related Documents. This is a guaranty of payment and performance and not of collection, so *Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against* anyone else obligated to pay the Indebtedness or against *any collateral securing the*

> *Indebtedness,* this Guaranty or any other guaranty of the Indebtedness. *Guarantor will make any payments to Lender ... without set-off or deduction or counterclaim, ...* Under this Guaranty, *Guarantor's liability is unlimited and Guarantor's obligations are continuing.*

[CP 301 (emphasis supplied).] On January 28, 2011, a second Commercial Guaranty was executed by Charles R. Johnson, II, to Umpqua (the "Umpqua Guaranty") [CP 274, 313-16], including terms identical to the quoted Evergreen Guaranty terms [CP 313].

On January 25, 2010, some Evergreen Bank assets were acquired by Umpqua, including the Loan. Umpqua is the owner and holder of the Note, Replacement Note, the Deed of Trust, Evergreen Guaranty, and Umpqua Guaranty. [CP 273.] Shasta subsequently defaulted on the Loan by failing to make the payments when due. [CP 274-75.]

B. Umpqua Sues Shasta and the Johnsons for Judicial Foreclosure Without Waiving Any Balance Due, Court Appoints Receiver, Court Orders and Approves Receiver's Property Sale Without Redemption Rights, Shasta and the Johnsons Object to No Receiver's Filings, Money Judgment is Entered, and Shasta and the Johnsons Appeal.

To collect against Shasta and the Johnsons on the Replacement Note and Guarantees, on March 19, 2012, Umpqua filed its "Petition for Appointment of General Receiver for Real Property ... *And* for Judicial

Foreclosure."[2] [CP 1-12 (emphasis supplied).] The Petition contains no RCW 61.12.070 waiver of Umpqua's deficiency right. [*Id.*]

Nearly one year later, April 6, 2012, on Umpqua's motion the trial Court appointed Centerpoint Management, Inc. as General Receiver of Shasta (the "Receiver"). [CP 98-104.] Regarding sale terms, the Order provided:

> The Receiver shall have authority to liquidate [Shasta's] property and business assets pursuant to RCW 7.60.260. The Receiver's sale of any collateral property shall be effected free and clear of liens and of all rights of redemption whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property.

[CP 101.] As to the effect on Umpqua's rights, the Order stated:

> *Umpqua Bank's acceptance* and application of said net rents, income and profits, ..., *shall* ***not*** *constitute a waiver or cure of the defaults* under the Deed of Trust ***nor a defense to any sale, or*** judicial or nonjudicial ***foreclosure*** of the Deed of Trust encumbering the Property.

[CP 103-04 (emphasis supplied).] Shasta and the Johnsons did not oppose the Receiver's appointment or the Order terms. [CP 96-97.]

Over the next eleven months, the Receiver filed five motions, five

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[2] The Petition did not seek a Receiver's appointment to "sell the Property *and/or* judicially foreclose the Property," as represented by Appellants. [Appellants' Brief, p. 4 (emphasis supplied).]

Notices of Compensation, and three reports.[3] [CP 117-31, 136-55, 158-61, 166-264, 448-463.] None of those 13 filings by the Receiver were opposed by Shasta or the Johnsons. On May 25, 2012, a default Order was entered against the Johnsons. [CP 132-33.]

On July 26, 2013, the Receiver filed its Motion to Sell the Property Free and Clear of Liens, and for other authority pertaining to Shasta's Property. [CP 198-204.] The motion was supported by the Receiver's Declaration [CP 209-234], detailing Property marketing efforts and the Receiver's opinion and "reasonable business judgment, [that] consummation of the Transaction is in the best interest of the receivership estate, its creditors, and other interested persons" [CP 211]. Again, neither Shasta nor the Johnsons objected to the motion [CP 237], and the Court entered the Order as proposed,[4] approving the Property sale without redemption rights [*compare,* CP 205-08 to CP 236-39].

The sale was conducted and proceeds, after expenses, paid to Umpqua. [CP 252-53.] Umpqua credited the proceeds to Shasta's Loan account, but nearly $900,000 remained due and owing. [CP 351-52.]

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[3] The motions were to approve the Receiver's bond, approve employment of a real estate broker, approve employment of other professionals, sell the Property, and terminate the Receivership.

[4] Contrary to Appellants' representation [Appellants' Brief, p. 5], the Order was proposed by the Receiver's counsel, not Umpqua's counsel. [CP 205-08.]

To complete collection of the balance due on the Replacement Note and enforce the Guarantees, on December 12, 2014, Umpqua filed its Motion for Summary Judgment Against Shasta Apartments, LLC, and for Entry of Default Judgment Against Other Respondents [CP 337-49], supported by Declarations and other evidence [CP 350-67]. Umpqua cited the controlling laws of contracts, promissory notes, and commercial guarantees in support of its request for an award of the full remaining unpaid balance due of nearly $900,000. [CP 345-49.]

Also on November 14, 2014, Appellants filed their Motion for Summary Judgment [CP 368-75], supported only by evidence previously filed by Umpqua and pleadings of record [CP 376-463]. Shasta and the Johnsons argued Umpqua elected its remedy by initiating the Receivership which sold the Property without redemption rights, effectively completed a nonjudicial foreclosure, and could not seek a deficiency award for the remaining balance due. [CP 369, 371-75.] Appellants made the same arguments in opposing Umpqua's summary judgment motion. [CP 477-85.] Shasta and the Johnsons did not address the authorities cited in Umpqua's motion. [*Compare,* CP 337-49 with CP 477-85.]

Opposing Shasta's and the Johnsons' summary judgment motion, and in reply to their Opposition to Umpqua's motion, Umpqua again argued the application of contract law and that the Election of Remedies

Doctrine did not apply to bar a money Judgment. [CP 469-71, 499-507.] The parties repeated their positions at oral argument of the cross-motions. [RP 1-13.]

The trial court granted Umpqua summary judgment of the full post-sale balance due [CP 508-10], denied Appellants' summary judgment motion [CP 511-13], and after awarding Umpqua its fees and costs [CP 543-45], on February 6, 2015, entered Judgment for Umpqua and against Shasta and the Johnsons, jointly and severally, in the amount of $932,997.22 [CP 546-48]. This appeal timely followed.

IV. STANDARD OF REVIEW AND ARGUMENT

A. Summary Judgment Awards are Reviewed *De Novo*.

The appellate standard of review of a summary judgment order is *de novo*, with the reviewing court performing the same inquiry as the trial court. *Del Guzzi Constr. Co. v. Global Northwest Ltd.,* 105 Wn.2d 878, 882, 719 P.2d 120 (1986); *Hartley v. State,* 103 Wn.2d 768, 774, 698 P.2d 77 (1985). Evidence not presented to the trial court is not considered on appeal. *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 390, 715 P.2d 1133 (1986); *Herron v. Tribune Pub. Co., Inc.,* 108 Wn.2d 162, 169, 736 P.2d 249, 255 (1987).

B. The Trial Court did Not Err by Failing to Apply the Election of Remedies Doctrine, Enforcing the Parties' Contract Terms, and Granting Umpqua Summary Judgment for the Unpaid Balance Due.

Absent any citations, Shasta and the Johnsons argue: "In electing one remedy, a party must forgo others along with their respective benefits and drawbacks. ... [T]he result of [Umpqua's request for a Receiver's appointment] is that Umpqua is not entitled to seek a deficiency judgment against ... Shasta, or ... the Johnsons." [Appellants' Brief, p. 2.] Shasta's and the Johnsons' assertion is unsupported, and the Election of Remedies Doctrine does not apply to these facts.

The doctrine's purpose is to prevent double redress for a single wrong (*Birchler v. Castello Land Co., Inc.,* 133 Wn.2d 106, 112, 942 P.2d 968 (1997)), and ensure the plaintiff recovers no more than the value of the harm suffered (*Bremerton Central Lions Club, Inc. v. Manke Lumber Co.,* 25 Wn. App. 1, 5, 604 P.2d 1325 (1979)). A party will only be constrained by the doctrine if: (1) two or more remedies exist at the time of the election; (2) the remedies are repugnant to and inconsistent with each other; and (3) the party to be bound chooses one of the remedies. *Birchler, supra,* 133 Wn.2d at 112. The trial court was correct in not applying the doctrine here for several reasons.

First, the very character of the disputed award – a deficit – establishes Umpqua was granted neither double redress nor more than its entitled amount. A "deficiency" judgment is simply the difference

between the outstanding loan balance and the lesser collateral proceeds received, plus costs allowed by contract. *First-Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787, 793-96, 313 P.3d 1208 (2013); *also see, Washington Fed. v. Gentry,* 179 Wn. App. 470, 475-76, 319 P.3d 823, *aff'd., Washington Fed. v. Harvey,* 182 Wn. 2d 335, 340 P.3d 846 (Jan. 8, 2015). Consequently, by definition and the laws of arithmetic the Judgement did not award Umpqua more than it was entitled to collect.

Second, the trial court awarded Umpqua remedies neither inconsistent nor repugnant. The trial court correctly found the Replacement Note was not paid in full by proceeds from the Receiver's sale.[5] Accordingly, it entered a money Judgment for the post-sale balance due. Consequently, the Receiver's sale and Umpqua's Judgment are not mutually exclusive or individually exhaustive proceedings.

Third, Umpqua did not choose a single exhaustive or exclusive remedy. Instead, Umpqua requested the trial court enforce the parties'

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[5] Appellants' implied assertion that Umpqua somehow unduly benefitted – to their detriment – from the Court-ordered terms of the Receiver's sale is ill-considered. [Appellants' Brief, pp. 5-6.] The greater the Receiver's sale proceeds paid to Umpqua, the less the balance due amount awarded against Appellants. Further, the Court appropriately ordered the sale was exempt from real estate excise taxes under the exception granted by the version of RCW 82.45.010(3)(i) then in effect (now RCW 82.45.010(3)(j)): "Any transfer or conveyance made pursuant to a deed of trust or an order of sale by the court in any mortgage, deed of trust, or lien foreclosure proceeding[.]" *See, Wash. St. Dep't. of Rev. v. Fed. Deposit Ins. Corp.*, 2015 WL 5330880, *5, -- Wn. App. --, -- P.3d -- (Sept. 14, 2015).

contracts to grant it full relief, and the court did so – without committing any error. Shasta's Business Loan Agreement with Umpqua provides:

> Lender shall have all the rights and remedies provided in the Related Documents or available at law, in equity, or otherwise. ... *[A]ll of Lender's rights and remedies shall be* ***cumulative*** and may be exercised singularly or concurrently. *Election by Lender to pursue any remedy shall* ***not*** *exclude pursuit of any other remedy*, and an election ... *shall* ***not*** *affect Lender's right to ... exercise* its rights and remedies.

[CP 47, 49, 82 (emphasis supplied).]

The Johnsons' Guaranty to Umpqua was of the same import:

> Guarantor *absolutely and unconditionally guarantees full* and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations under the Note and the Related Documents. *This is a guaranty of payment and performance* and not of collection, so *Lender can enforce this Guaranty against Guarantor even when Lender has* ***not*** *exhausted Lender's remedies .... Guarantor will make any payments to Lender ...* ***without set-off or deduction or counterclaim,*** .... Under this Guaranty, *Guarantor's liability is unlimited and Guarantor's obligations are continuing.*

[CP 313 (emphasis supplied).] Finally, the Deed of Trust states: "Election by Lender to pursue any remedy shall not exclude pursuit of any other remedy ...." [CP 60.]

Consequently, the trial court had authority to appoint a Receiver under both the loan documents and RCW 7.60.025,[6] and Shasta and the Johnsons contractually agreed that Umpqua's election to petition for a Receiver's appointment did not exclude its pursuit of other remedies.

> Once a court has made findings of fact that events of default have occurred, ..., *it **must** grant the non-defaulting party **the remedies contracted for*** .... At this juncture *a court is **without legal power** to interpose its judgment for that of the parties* as to whether or not the remedies contracted for are more harsh than accord with its own sensibilities. ... *Neither this court nor a trial court may make a new contract for the parties.* ***Courts have the lawful power only to enforce the contract which the parties have made for themselves.***

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[6] RCW 7.60.025 provides, in part:
"(1) A receiver may be appointed by the superior court of this state in the following instances, but except in ... any case in which a receiver's appointment with respect to real property is sought under (b)(ii) of this subsection, a receiver shall be appointed only if the court additionally determines that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate:
(a) On application of any party, when the party is determined to have a probable right to or interest in property that is a subject of the action and in the possession of an adverse party, or when the property or its revenue-producing potential is in danger of being lost or materially injured or impaired. A receiver may be appointed under this subsection (1)(a) whether or not the application for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment or other relief;
(b) Provisionally, after commencement of any judicial action ... to foreclose upon any lien against or for forfeiture of any interest in real or personal property, on application of any person, when the interest in the property that is the subject of such an action or proceeding of the person seeking the receiver's appointment is determined to be probable and either:
(i) The property or its revenue-producing potential is in danger of being lost or materially injured or impaired; or
(ii) The appointment of a receiver with respect to the real or personal property that is the subject of the action or proceeding is provided for by agreement or is reasonably necessary to effectuate or enforce an assignment of rents or other revenues from the property. ..."

Foster v. Knutson, 84 Wn.2d 538, 545-46, 527 P.2d 1108 (1974) (citing, *Spokane Savings & Loan Soc. v. Park Vista Improvement Co.,* 160 Wash. 12, 294 P. 1028 (1930)).

Because Shasta and the Johnsons contracted that Umpqua may pursue all available remedies at Umpqua's sole election, and the Election of Remedies Doctrine is not applicable to these facts, the trial court did not err in enforcing the parties' contracts, granting Umpqua summary judgment, denying Appellants summary judgment motion, and entering a money Judgment for the post-sale deficit for Umpqua.

C. After Ordering and Confirming the Receiver's Sale, the Trial Court did Not Err by Granting Umpqua Summary Judgment for the Post-Sale Deficit, Because the Receivership Act does Not Prohibit a Deficit Award.

Appellants claim that regardless of the terms of the Receiver's sale, Umpqua had no right to a money award for the post-sale deficit due it. [Appellants' Brief, pp. 8-9.] This alleged error is premised on three incorrect assertions of law.

1. The Receivership Act is Not a Foreclosure Method.

Initially, Shasta and the Johnsons claim that "[a] secured creditor makes an election of remedies when its debtor defaults" [*id.,* p. 8], and list four "foreclosure process[es]" [*id.,* p. 9], including appointment of a general Receiver, which they assert are mutually exclusive. But merely relabeling a Receivership as a "foreclosure process" does not change its

statutory framework, and the assertion that a Receivership is an independent and exclusive foreclosure method fails for four reasons.

First, Appellants' own cited authorities recognize the Receivership Act is not a "foreclosure process." In *Thompson v. Smith*, the court itemized only three foreclosure methods, without listing the Receivership Act as one such method: "Consequently, the beneficiary of a trust deed is faced with an election of remedies upon default. The beneficiary may (1) where the trust deed secures a note, sue on the note; (2) foreclose under existing mortgage foreclosure proceedings; or (3) foreclose pursuant to [the Deed of Trust Act]." *Thompson v. Smith*, 58 Wn. App. 361, 366, 793 P.2d 449 (1990) (citations omitted) (discussed *infra,* at pp. 27-29).

Second the Receivership Act, RCW 7.60, *et seq.,* may be used in conjunction with – not exclusive of – both judicial and nonjudicial foreclosure actions. *See,* RCW 7.60.025(1)(b) ("A receiver may be appointed ... after commencement of any judicial action or nonjudicial proceeding to foreclose upon any lien against ... real ... property ...."). Contrary to Appellants' claims:

> A receivership is merely ***ancillary*** *to the main cause of action and is* ***not an independent remedy***. The appointment of a receiver *can be invoked only in a* ***pending*** *suit* brought to obtain some relief which the court has jurisdiction to grant, and *cannot be employed to determine finally the rights* of the parties.

Grays Harbor Comm'l. Co. v. Fifer, 97 Wash. 380, 382, 166 P. 770 (1917) (emphasis supplied); *accord, U.S. v. Sloan Shipyards Corp.,* 270 F. 613, 617 (1920) ("A receivership cannot be considered final relief. It is merely an agency by which the court may reach out and administer assets having relation to the general relief.") (construing Washington law).

Third, it is black letter law that a Receiver's sale is considered a judicial – not nonjudicial – proceeding, as characterized by the Washington Supreme Court. In *Walton v. Severson*, considering whether the trial court had authority to set aside a purchase contract between a court-appointed Receiver and a third-party purchaser, the court discussed the nature of receivership proceedings. It quoted with approval an authoritative treatise:

> *A judicial sale is one made as a result of judicial proceedings by a Receiver appointed by the court.* ***A Receiver's sale is a judicial sale.*** *The court is the vendor*, even though the person appointed to make the sale is the officer of the court. The sale is not absolute until confirmed. *The order of confirmation gives the judicial sanction of the court,* and when made relates back to the time of sale ....

Walton v. Severson, 100 Wn.2d 446, 452, 670 P.2d 639 (1983) (quoting, 2 R. Clark §482, at 784–85 (footnotes omitted)) (emphasis supplied); *accord,* 2 Patton and Palomar on Land Titles, sec. 475 (3d ed. 2014) ("[S]ales by receivers are sales made by the court through its duly

appointed officer. Such sales are therefore strictly judicial in character....").

Although there was a dissenting opinion in *Walton,* it agreed the "long-accepted rule" is that a Receiver's sale constitutes a judicial sale:

> ***It is elementary that a Receivers sale is a judicial sale*** and the Receiver acts only as an officer of the court, *sells as and for the court,* and sales conducted by him must be confirmed by the court in order to be valid.

Walton, supra, 100 Wn.2d at 454 (dissenting opinion) (quoting, *Tobey v. Poulin,* 141 Me. 58, 62, 38 A.2d 826 (1944)) (emphasis supplied).

And finally, as briefed above, Shasta and the Johnsons are bound by their contracts waiving any remedies election defenses. Accordingly even could a Receiver's sale somehow be deemed a third type of "foreclosure process," independent and exclusive of judicial[7] and nonjudicial[8] foreclosures, it would be inconsequential, because Appellants are contractually barred from raising that defense.

Because the Receivership Act does not provide an independent and exclusive foreclosure method – and Appellants contractually waived such a defense regardless – their arguments based on that premise fail.

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[7] RCW 61.12, *et seq.*

[8] RCW 61.24, *et seq.*

2. Appellants' Authorities do Not Establish that the Right to a Post-Receiver's Sale Deficit Award is Statutory.

Shasta's and the Johnsons' second incorrect assertion of law regarding their claimed error is that "[t]he right to a deficiency judgment in Washington is purely statutory." [Appellants' Brief, p. 8.] The three cases they cite do not support that proposition.

In Appellants' first cited case, responding to certified questions from the Ninth Circuit the Washington Supreme Court noted: "The extent to which a deficiency judgment may be obtained is solely a matter of state law." *Wash. Mut. Sav. Bank v. U.S.,* 115 Wn.2d 52, 55, 793 P.2d 969 (1990). The Court did not state or even address whether the right to a post-Receiver's sale deficit Judgment is purely statutory.[9] Instead it noted only that deficiency judgments are not allowed when foreclosing Deeds of Trust nonjudicially, but may be obtained in judicial foreclosures. *Id.,* at 58. The Court "decline[d] to create an exception to this statutory bar [against deficiency judgments after nonjudicial foreclosures] by judicial fiat." *Id.*

Appellants' second cited case is similarly inapposite. In *Bank of*

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[9] Indeed, such a holding would fly in the face of other Washington Supreme Court opinions holding that parties' contractual remedies must be enforced as written, as stated in *Foster v. Knutson*, 84 Wn.2d 538, 545-46, 527 P.2d 1108 (1974) (citing, *Spokane Savings & Loan Soc. v. Park Vista Improvement Co.,* 160 Wash. 12, 294 P. 1028 (1930)), quoted at pp. 16-17, *supra.*

Hemet v. U.S., 643 F.2d 661 (1981), the Ninth Circuit construed California law to determine whether a bank's second lien was discharged by its purchase of the first lien at a foreclosure sale. The case has nothing to do with post-sale money awards under Washington law and did not involve a Receiver's sale to a third-party, as here.

Shasta and the Johnsons correctly quote their third cited authority, *Bradley Eng. and Machinery Co. v. Muzzey,* 54 Wash. 227, 229, 103 P. 37 (1909), but fail to inform this Court that the case supports Umpqua's position and the trial court's Orders here. The *Bradley* court quoted the statute then in effect – and essentially unchanged now[10] – as follows:

> When there is an agreement of the judgment debtor for the payment of any sum of money secured by a mortgage or other lien, and a deficiency judgment is consented to in said agreement, the court may direct in the decree that the balance due and costs which may remain unsatisfied after the sale of the property shall be satisfied from any property of the judgment debtor ....

Id., at 230-31. It then held that when the mortgage documents do not provide one way or the other whether a deficiency judgment may be had, the mortgagee is entitled to a deficiency judgment just as if the mortgage

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[10] *Compare,* RCW 61.12.050: "When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor ...."

and/or Note had provided for one. *Id.,* at 231-32. Here, the Deed of Trust does so provide.[11] [CP 56.]

Appellants' cited case authorities do not establish that regardless of the parties' contracts, the trial court erred in awarding Umpqua a post-sale deficit Judgment because there is no specific provision for such an award in the Receivership Act.

3. The Receivership Act does Not Conflict with the Statutory Judicial Foreclosure Deficiency Award.

Shasta's and the Johnsons' third incorrect assertion of law is that Umpqua "made the deliberate choice to be bound by the limitations imposed on it by the Receivership Act." [Appellants' Brief, p. 9.] But there are no such limitations in that Act barring a post-sale award of the remaining balance due, and Shasta and the Johnsons cite to none.

In a judicial foreclosure proceeding after the property sale proceeds are credited and determined insufficient to satisfy the debt, a deficiency Judgment is expressly mandated by statute, unless expressly waived in the mortgagee's Complaint. RCW 61.12.070. Umpqua sued for judicial foreclosure and an award of the unpaid balance due, and did not waive entitlement to a deficiency in its Complaint. [CP 1-12.] As

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[11] "Grantor waives all rights or defenses arising by reason of any 'one action' or 'anti-deficiency' law, or any other law which may prevent Lender from bringing any action against Grantor, including a claim for deficiency ...." [CP 56.]

held by the Washington Supreme Court, a Receiver's sale is a judicial sale. *Walton, supra,* 100 Wn.2d at 452.

Appellants articulate no reason that the deficit remaining after crediting proceeds from a court-ordered and court-approved Receiver's sale should be treated any differently from the deficit remaining after a court-ordered and court-approved foreclosure sale. There is no rational basis to conclude Umpqua is not entitled to Judgment for its post-Receiver's sale deficit, but would be entitled to Judgment for its post-foreclosure sale deficit under RCW 61.12.070.[12]

There is no conflict between the judicial foreclosure statute, RCW 61.12, *et seq.,* and the Receivership Act, RCW 7.60, *et seq.,* as urged by Shasta and the Johnsons. But even if there was such a conflict:

> [I]t is the duty of the court to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used.

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[12] The fact that Umpqua's right to a deficiency award is not referenced in either the Order appointing the Receiver or Order approving the sale, as referenced by Appellants [Appellants' Brief, p. 6], is inconsequential. Those Orders govern the Receiver's authority granted by the Court, not Umpqua's rights as established by the pleadings, the parties' contracts, and statutory and case law authorities.

Further, it would be premature and unnecessary for the Court to address the possible deficit balance in those Orders until it was determined, post-sale, whether a deficit in fact existed. Regardless, the appointment Order *does* preserve all of Umpqua's rights: "*Umpqua Bank's acceptance* and application of said net rents, income and profits, ..., *shall* ***not*** *constitute a waiver or cure of the defaults* under the Deed of Trust ***nor a defense to any sale, or*** judicial or nonjudicial ***foreclosure*** of the Deed of Trust encumbering the Property." [CP 103-04 (emphasis supplied).]

State ex rel. Royal v. Bd. of Yakima Cnty. Comm'rs., 123 Wn.2d 451, 459-60, 869 P.2d 56, 61 (1994) (quoting *Tommy P. v. Board of Cy. Comm'rs.*, 97 Wn.2d 385, 391-92, 645 P.2d 697 (1982)). Both the judicial foreclosure statute and the Receivership Act are effectuated, without distortion of any statutory language, by affirming the trial court's award of the post-sale balance due to Umpqua.

Moreover when guarantors do not secure their guarantees by granting Deeds of Trust, and title to the foreclosed property is not in the guarantors, the guarantors are not protected from deficiency judgments under the Deed of Trust Act – even if the anti-deficiency provision protects the borrowers because the property was foreclosed nonjudicially. *Washington Fed. v. Harvey*, 182 Wn.2d 335, 341, 340 P.3d 846 (2015). Thus, even if Appellants could somehow overcome Shasta's waiver of anti-deficiency defenses [CP 56], under this Washington Supreme Court precedent the trial court correctly ruled that the Johnsons, as guarantors, remain liable for the post-sale balance due to Umpqua.

The debtor's and guarantors' claim that no authority permits entry of a money Judgment for the deficit remaining after a Receiver's sale is unfounded, ill-considered, and incorrect. There is no conflict between the Receivership Act, the Deed of Trust Act, and the judicial foreclosure statutes, and Appellants cite no authority so holding. The Receivership

Act is to be used in conjunction with – not instead of – foreclosure remedies, which is precisely what occurred here. The trial court did not err in awarding money Judgment to Umpqua for the balance due, after confirming the Receiver's sale.

D. After Ordering and Confirming the Receiver's Sale Without Redemption Rights, the Trial Court did Not Err by Granting Umpqua Judgment for the Unpaid Balance Because Umpqua Sued for Judicial Foreclosure and did Not Expressly Waive its Entitlement to Any Post-Sale Amount Due, and a Receiver's Sale is Not a Nonjudicial Forclosure.

Appellants' second claimed error is only a slight alteration of their first. They assert that because the Receiver's sale was without redemption rights it was effectively a nonjudicial foreclosure, resulting in Umpqua being barred by RCW 61.24.100 from obtaining an award of the remaining post-sale deficit. Again, Appellants' reasoning is flawed and unsupported.

First, Shasta and the Johnsons gratuitously mischaracterize the Receivership Act as a "foreclosure method" [Appellants' Brief, p. 10] rather than what it is – an equitable power of the trial court that may be used in conjunction with both the judicial and nonjudicial foreclosure statutes. The Act expressly allows the trial court to order the Receiver sell without redemption rights, regardless whether sufficient proceeds to fully

pay the debt will be realized. RCW 7.60.260(2).[13]

Second, Shasta's and the Johnsons' Brief is devoid of any authority supporting that after a Receiver's sale without redemption rights, a Judgment for the remaining balance due is "simply not available under Washington law" [Appellants' Brief, p. 10], and the Deed of Trust Act, RCW 61.24, *et seq.,* suggests to the contrary.

Except as otherwise provided in the Deed of Trust Act, "a deed of trust is subject to all laws relating to mortgages on real property" (RCW 61.24.020), and may be foreclosed either judicially or nonjudicially *(Helbling Bros., Inc. v. Turner,* 14 Wn. App. 494, 496–97, 542 P.2d 1257 (1975)). A deficiency judgment is allowed when a deed of trust is foreclosed as a real property mortgage, because the anti-deficiency statute of the Deed of Trust Act is inapplicable to a Deed of Trust that is foreclosed judicially. RCW 61.24.100(8).

The sole case authority cited by Appellants in support of their claimed error is unpersuasive and not controlling. In *Thompson v. Smith,* 58 Wn. App. 361, 793 P.2d 449 (1990), Division I considered whether the

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[13] RCW 7.60.260(2) provides: "The court may order that a general receiver's sale of estate property ... be effected free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property ...."

creditor's previous acceptance of a deed-in-lieu of foreclosure prevented him from obtaining a money judgment in a subsequent suit to collect on the Note. Noting that the Deed of Trust Act was "a substantial attempt to streamline antiquated property security procedures in accordance with the needs of modern real estate financing," the court described the "quid pro quo between lenders and borrowers":

> Debtors, among other things, relinquished a right to redemption and to a judicially imposed upset price. Creditors, in exchange for inexpensive and efficient non-judicial foreclosure procedures, sacrificed a substantial benefit that remains available in a judicial foreclosure [a deficiency award].

Id., at 365. The *Thompson* court held that by accepting the deed-in-lieu of foreclosure, the lender "essentially carried out a nonjudicial foreclosure without having to follow the statutory procedures[;]" accordingly, it denied him an award of the balance in his suit on the Note. *Id.,* at 366.

Those facts are precisely what distinguish *Thompson* from the case at bar. Here, *no* foreclosure was conducted, either actually or effectively. Instead, after considering several motions, supporting evidence, granting opportunities to respond, and conducting hearings, the trial court ordered the Receiver to sell the Property to a third party free of redemption rights. It did not enter a foreclosure decree, nor did the Sheriff conduct the sale.

It was also the trial court which ultimately confirmed that sale. Other than initially requesting appointment of a Receiver to secure its collateral, Umpqua was not involved whatsoever in the Property marketing and/or sale. Also, Umpqua sued for entirely different relief – judicial foreclosure, appointment of a receiver, and a money award for any remaining post-sale balance. In *Thompson,* the creditor attempted only a suit on the Note after accepting a deed-in-lieu.

These facts are sharply divergent from the "self-help" remedy the *Thompson* court denied. *Id.,* at 366. A court-ordered and court-supervised sale by an independent Receiver in the context of litigation to judicially foreclosure a commercial loan, as here, can hardly be deemed the equivalent of a creditor negotiating a deed-in-lieu with an unsophisticated borrower and subsequently suing on the Note, as in *Thompson.*

Moreover other than the right to redeem,[14] Shasta and the Johnsons lost no rights by the Receiver's sale – unlike the *Thompson* debtor. They were still provided with all requisite notices and had every opportunity to object to and contest the Receiver's proposed sale manner, terms, and price. Accordingly, they did not "relinquish[ ] a right to ... a judicially imposed upset price[,]" as concerned the *Thompson* court. *Id.,* at 365.

[14] It is apparent Appellants were never interested in or financially able to exercise that right.

Rather, they merely chose not to exercise the right to challenge the sale means, mode, method, terms, and price which the trial court ultimately found acceptable. [CP 237.]

Third, Appellants' arguments that the Deed of Trust Act would be rendered "superfluous ... without requiring the statutorily-mandated procedures and protections" [Appellants' Brief, p. 13] are nonsensical, given that *all* such "procedures and protections" were provided here, and Umpqua sued for judicial – not nonjudicial – foreclosure. Neither Shasta nor the Johnsons ever objected to or questioned notices concerning or the substance of any pleadings regarding: (1) the Receiver's appointment; (2) the Receiver's multiple reports; (3) employment of a real estate broker to sell the property; (4) compensation of the Receiver; (5) sale of the property; (6) the sale terms including freedom from redemption rights; and (7) discharge of the Receiver.

Other than the request to appoint a Receiver, each of those pleadings was filed by the Receiver, and each was ordered by the trial court. [CP 117-31, 136-55, 158-61, 166-264, 448-463.] Shasta and the Johnsons cite to no evidence and make no arguments that Umpqua itself requested the sale be made without redemption rights, or waived any rights under the Loan documents by accepting proceeds of the Court-ordered sale.

It is clear the trial court never intended to deprive Umpqua of any post-sale remaining balance award, because Umpqua's Complaint did not waive its entitlement to one.[15] [CP 1-12.] The Court expressly authorized and required the Receiver to "take charge of [Shasta's] assets, including the Property, and ... collect the rents, deposits and profits thereof *for the* ***benefit*** *of Umpqua Bank, through the completion of a sale* of the Property by the Receiver, *or a judicial* or nonjudicial *foreclosure action* of the Property." [CP 100 (emphasis supplied).] The Receiver appointment Order also provides:

> *Umpqua Bank's acceptance* and application of said net rents, income and profits, ..., *shall* ***not*** *constitute a waiver or cure of the defaults* under the Deed of Trust ***nor a defense to any sale, or judicial*** or nonjudicial ***foreclosure*** of the Deed of Trust encumbering the Property.

[CP 103-04 (emphasis supplied).]

Uncontroverted authorities hold that when a secured party elects to foreclose a Deed of Trust under the judicial – rather than nonjudicial – foreclosure statutes, it is not precluded from obtaining a deficiency judgment.

> Where an individual elects to foreclose the deed of trust pursuant to the terms of RCW 61.24.040, the terms of RCW 61.24.100 are made operative, precluding the entry of a deficiency judgment or

[15] At oral argument, the trial court ruled: "I'm going to find that [Umpqua] did plead in [its] material that [it was] requesting deficiency. It says that." [RP, p. 13, ll. 16-17.]

> establishing a redemption period. Respondent, not having elected to foreclose the deed of trust pursuant to the terms of RCW 61.24.040, was not precluded from obtaining a deficiency judgment.

Helbling Bros., Inc. v. Turner, 14 Wn. App. 494, 497-98, 542 P.2d 1257 (1975) (footnote omitted). There is no cogent reason to treat the proceeds of the Receiver's sale any differently than the proceeds of a judicial foreclosure sale, and deny Umpqua the balance remaining due and owing.

Nothing in the Receivership Act, Deed of Trust Act, or judicial foreclosure statutes required the trial court to deny Umpqua a money Judgment for the post-sale balance due from Appellants, regardless of the Receiver's sale being made without redemption rights. The trial court did not err in awarding Umpqua summary judgment against Shasta and the Johnsons for the amount remaining due to Umpqua, entering Judgment thereon, and denying Appellants' summary judgment motion.

V. REQUEST FOR ATTORNEY'S FEES AND COSTS

Pursuant to RAP 18.1, the Deed of Trust, and the Guarantees, Umpqua requests this Court enter an award of its attorney's fees and costs incurred on appeal. The Replacement Note and Guarantees provide for such an award of fees and costs incurred on appeal:

> Lender may hire or pay someone else to help collect this Note if Borrower does not pay. Borrower will pay Lender that amount. This includes, ... Lender's attorneys' fees and Lender's legal expenses, ..., including attorneys' fees, ..., and appeals. ... Borrower also will pay any court costs, in addition to all other sums provided by law.

[CP 381.]

> Guarantor agrees to pay upon demand all of Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. ... Costs and expenses include Lender's attorneys' fees and legal expenses ... including attorneys' fees and legal expenses for ... appeals ....

[CP 396, 401.]

VI. CONCLUSION

Pursuant to CR 56(c), the Receivership Act, the Deed of Trust Act, the judicial foreclosure statutes, and the parties' contracts, the trial court did not err in its rulings. Respondent Umpqua Bank respectfully requests this Court:

1. Affirm the Order Denying Motion for Summary Judgment on Behalf of Respondents Shasta Apartments, LLC, and Charles R. Johnson, II and Elizabeth A. Johnson, Husband and Wife, entered December 12, 2014;

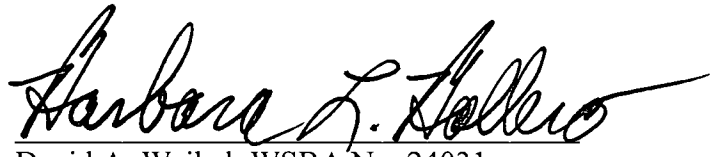
2. Affirm the Order Granting Petitioner's [Umpqua's] Motion for Summary Judgment Against Shasta Apartments, LLC, and for Entry of Default Judgment Against Other Respondents, entered December 12, 2014;

3. Affirm Umpqua's Judgment Against Respondents Shasta Apartment, LLC, Charles R. Johnson, II, and Elizabeth A. Johnson, entered February 6, 2015; and

4. Award Umpqua its prevailing party attorney's fees and costs incurred on appeal.

RESPECTFULLY SUBMITTED this 25th day of September, 2015.

MARSHALL & WEIBEL, P.S.



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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, per the electronic service agreement of the parties, I caused to be served via E-Mail and further via ABC Legal Messengers, a copy of the foregoing Brief of Respondent Umpqua Bank to:

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Signed at Seattle, Washington this 25th day of September, 2015.

MARSHALL & WEIBEL, P.S.

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